1. THE SIXTH CIRCUIT COURT OF APPEALS DID NOT EXERCISE ITS SUPERVISORY POWER IN A WAY THAT CONFLICTED WITH PETITIONER'S RIGHT OF DUE PROCESS BY DENYING PETITIONER'S STATUTORY RIGHT TO APPEAL AND/OR ARBITRARILY APPLYING ITS WAIVER RULE AND EXCEPTIONS.

A. The Waiver Rule at issue:

At issue here is a rule, adopted by the Sixth Circuit in *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981), and approved by this Court in *Thomas v. Arn*, which conditioned appeal upon a party filing objections to a magistrate's report within ten (10) days as provided for in 28 U.S.C. § 636(b)(1).

In *United States v. Walters*, the Sixth Circuit approved the waiver of a right to appeal and clearly held as follows:

> The permissive language of 28 U.S.C. § 636 [28 USCS § 636] suggests that a party's failure to file objections is not a waiver of appellate review. However, the fundamental congressional policy underlying the Magistrate's Act – to improve access to the federal courts and aid the efficient administration of justice – is best served by our holding that a party shall file objections with the district court or else waive right to appeal. Additionally, through the exercise of our supervisory power, we hold that a party shall be informed by the magistrate that objections must be filed within ten days or further appeal is waived.

638 F.2d at 949-950 (footnote and citations omitted). This express ruling by the Sixth Circuit was later affirmed in *Thomas v. Arn*, 474 U.S. at 145.

The hearing on various motions to enforce the settlement agreement was held before the Magistrate Judge on February 3, 2004. At the hearing, Tonya Harris was represented by Attorney Robin Flores. Tonya Harris provided testimony concerning her understanding of the terms of the settlement agreement and Attorney Flores stipulated that the only settlement offer from the City of Chattanooga was $28,500.00 which was communicated to his client. The Report and Recommendation of the Magistrate Judge was filed in the United States District Court on February 11, 2004. Footnote 2 of the Magistrate Judge's Report and Recommendation states:

> Any objection to this Report and Recommendation must be served and filed within ten (10) days after service of a copy of this recommended disposition on the objecting party. Such objections must conform to the requirements of Rule 72(b) of the *Federal Rules of Civil Procedure*. Failure to file objections within the time specified waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140, 88 L.Ed.2d 435, 106 S. Ct. 466 (1985). The District Court need not provide *de novo* review where objections to this Report and Recommendation are frivolous, collusive or general. *Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987).

No objection to the Report and Recommendation was timely filed and on March 3, 2004, United States District

Judge entered an Order accepting and adopting the Magistrate Judge's findings of fact, conclusions of law, and recommendations pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the *Federal Rules of Civil Procedure*.

From the beginning of this suit through Attorney Flores' withdrawal of the case on April 8, 2004, Tonya Harris was represented by Attorney Robin Flores. In a subsequent letter dated March 23, 2004, from Tonya Harris to Judge Curtis Collier, Appellant states that she terminated Attorney Flores as her attorney on Friday, March 12, 2004. In that letter, Ms. Harris requested that Judge Collier set aside the Order that was entered on March 3, 2004 because "this alleged settlement agreement was procured with fraud and deception by my former attorney Robin Flores." Upon motion, Attorney Flores was eventually allowed to withdraw from representation on April 8, 2004.

This Court, in the case of *Thomas v. Arn*, clearly held that the party shall be informed by the Magistrate that objections must be filed within ten (10) days or further appeal is waived. *Id.* at p. 470. There is no dispute in this case that the Magistrate Judge's Order filed on February 11, 2004 provided clear notice to the litigants and an opportunity to file objections timely as to the Report and Recommendation. None of the actions taken by the Magistrate or District Judge in this case violate either the Federal Magistrate's Act of the Constitution or this Court's ruling in *Thomas v. Arn*.

The Petitioner, in her late filed March 23 letter, did request that the District Judge set aside his Order Affirming the Report and Recommendation of the Magistrate Judge which was reviewed and appropriately considered by the District Judge in the Order and Memorandum entered on May 14, 2004. (Appendix 1). The letter was filed well past the ten

(10) day time limit for objections to be filed. The Petitioner's March 23rd letter was not treated as an objection but appropriately treated by the District Judge and the Sixth Circuit as a Motion to Reconsider under Rule 60 of the *Federal Rules of Civil Procedure*. Both of the underlying courts properly found no legal basis for the original dismissal to be changed under Rule 60 following the settlement which was accepted in this case. Thus, this petition should be denied because of the failure to timely object and due to waiver of issues presented for appeal.

B. Certiorari is not warranted because the District Court has not committed "plain error."

The Petitioner asserts that this Court in *Thomas v. Arn* expressly reserved the issue of how Appellate Courts must apply exceptions to their waiver rules. Justice Marshall, in *Thomas v. Arn*, clearly found that a Court of Appeals may adopt a rule conditioning appeal, when taken from a District Court Judgment that adopts a Magistrate's recommendation, upon the filing of objections with the District Court identifying those issues on which further review is desired. Such a rule, at least when it incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections, is a valid exercise of the supervisory power that does not violate either the Federal Magistrate's Act or the Constitution. 474 U.S. at 155.

This Court, in *Thomas v. Arn*, found the Sixth Circuit rule to be reasonable and found that litigants subject to the Sixth Circuit's rules are afforded "an opportunity. . . granted at a meaningful time and in a meaningful manner,". Quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). None of the interests in this civil case require application of Rule 52(b) of the *Federal Rules of Criminal Procedure* to state that a Court

may correct plain error despite the failure of the party to object. To the extent that Petitioner attempts to apply the *Federal Rules of Criminal Procedure* in this case, such rules are not applicable and this case is not appropriate for certiorari to compel the Sixth Circuit to apply other exceptions to its waiver rules. In reviewing this case, the Sixth Circuit clearly considered its previous authority in *United States v. Campbell*, 261 F.3d 628, 632 (6th Cir. 2001); and *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981), in addition to the *Thomas v. Arn* case. None of those decisions or the approach of the Sixth Circuit in reviewing this case establish that there is plain error in the Magistrate Judge's opinion or in the District Court's interpretation of underlying Tennessee law.

The Sixth Circuit Court of Appeals clearly reviewed allegations by Petitioner that the Magistrate Judge did not rely upon Tennessee law concerning whether the settlement agreement was enforceable in this case. After reviewing the letters and the plaintiff's own testimony, the Sixth Circuit found "it is clear from the record that plaintiff initially gave Flores express authority to settle the matter, and then later reversed her position." "By her acceptance of the offer, she gave her attorney express authority to accept the offer on her behalf." (Appendix to Petition, 14a). Under Tennessee law, where a principal gives an agent express authority to settle a case, either orally or in writing, the principal is bound by the acts of the agent within the scope of the authority expressly conferred upon the agent. *S. Ry. v. Pickle*, 138 Tenn. 238, 197 S.W. 675 (Tenn. 1917). The Sixth Circuit found in any event, by waiting two weeks before notifying her attorney of her intent to revoke her acceptance of the settlement agreement, plaintiff ratified the settlement agreement through her silence. (Appendix to Petition, 15a). As such, the Courts below have not found "plain error" in the application of

Tennessee law and the acceptance of a settlement offer in this case. As such, there is no plain error in this record and certiorari is not warranted on the grounds set forth at arguments IB and II of the Petition.

C. The actions of the Sixth Circuit, in reviewing this case, did not deny the Petitioner due process of law.

After a full review of the record, including the letters and the transcript in this case, the Sixth Circuit found that there was "clearly a meeting of the minds as to the essential terms of the contract on December 18, 2003, such that a binding contract under Tennessee law was created." The District Court did not err in enforcing it, and did not err in finding there was no adequate basis for relief under Rule 60(b)." As such, the Sixth Circuit reviewed the facts on the record and found that there was acceptance of a written settlement offer by the plaintiff.

Such factual findings are disregarded by the Petitioner in her extensive arguments over waiver exceptions available within the Sixth Circuit and whether such waiver rule and exceptions were properly applied by the Sixth Circuit Court of Appeals. The lengthy waiver argument by Petitioner maintains that its application in this case denied this Petitioner due process of law. As a factual matter in this case, the District Court, the Sixth Circuit and the Magistrate Judge, have now all found as a matter of fact that the plaintiff testified that she understood the settlement agreement but later decided to reject it. The Magistrate Judge made a clear finding that the Petitioner "testified at the evidentiary hearing that she talked with her attorney three or four times before finally agreeing to the settlement agreement with the defendants." (Appendix to Petition, 24a). These factual disputes over the meetings of the mind of the parties in this

settlement agreement are not appropriate grounds for the grant of a certiorari pursuant to Supreme Court Rule 10(a).

D. The Sixth Circuit did not act contrary to the precedent of this Court in weighing the evidence presented at hearings and making factual findings consistent with the evidence in the record.

The actions taken by the Sixth Circuit in this case did not decide factual issues *de novo*. The Court of Appeals did find that "a review of her testimony before the Magistrate reflects that the plaintiff accepted the offer of $28,500.00 and later reversed her acceptance." By reviewing the information in the record, the Sixth Circuit held that it is clear from the record that plaintiff initially gave express authority to settle the matter and then later reversed her position. Those factual findings were clearly reviewed by the Sixth Circuit and the District Court below. The application of the Sixth Circuit in this case properly reviewed the District Court's factual findings under the clearly erroneous standard and reviewed legal conclusions under a *de novo* review. *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995).

Such action by the Sixth Circuit in this case did not overstep the bounds of its duty under Rule 52(a) of the *Federal Rules of Civil Procedure* but merely reviewed information contained within the record concerning the factual positions of the parties considered by the Courts below. Rule 52 clearly allows the Court of Appeals, on review of a District Court judgment, to assume an implied finding of fact consistent with the judgment, so long as there is evidence to support the implied finding. See *Zack v. Commissioner*, 291 F.3d 407, 412 (6th Cir. 2002); and *Century Marine, Inc. v. United States*, 153 F.3d 225, 231 (5th Cir. 1998). Such

action by the Sixth Circuit in this case does not warrant granting a petition for writ of certiorari.

E. Any split among the Circuits in applying exceptions to waiver rules, was previously recognized in *Thomas v. Arn*.

Petitioner asserts that this Court should grant a Rule 10 for certiorari because there is a split among the Circuits in applying exceptions to the waiver rules enforced by those Circuits. This Court, in *Thomas v. Arn*, 474 U.S. at 147, clearly found that the Sixth Circuit's decision to require the filing of objections is supported by sound consideration of judicial economy. The filing of objections to a Magistrate's Report enables the District Judge to focus his attention on those issues– factual and legal– that are at the heart of the parties' dispute. This Court further found that the Sixth Circuit's rule, by precluding appellate review of any issue not contained in objections, prevents a litigant from "sandbagging" the District Judge by failing to object and then appealing. *Id.*, 474 U.S. at 148. Absent such rule, any issue before the Magistrate would be a proper subject for appellate review. This would either force the Court of Appeals to consider claims that were never reviewed by the District Court, or force the District Court to review every issue in every case, no matter how thorough the Magistrate's analysis, and even if both parties were satisfied with the Magistrate's report.

This Court adequately considered in *Thomas v. Arn*, 474 U.S. at 146, fn. 4, the arguments addressed by Petitioner that other Circuits may have adopted waiver rules which are somewhat different. This Court previously reviewed the waiver rules in the First, Second, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits in *Thomas v. Arn* and determined that

the power of the Courts of Appeals to mandate "procedures deemed desirable from the viewpoint of sound judicial practice, although in no wise commanded by statute or by the Constitution, would occur without violation of due process of law. *Id.* at 146. The application of the waiver rule of the Sixth Circuit in this case does not part from this Court's previous ruling in *Thomas v. Arn*, and does not warrant the granting of a petition for writ of certiorari in this case.

F. There was no arbitrary application of Sixth Circuit waiver exceptions which would warrant any grant of certiorari.

The petitioners assert that a conflict exists within the Sixth Circuit in the application of the waiver provision "in the interest of justice" between *Kelley v. Withrow,* 25 F.3d 363, 366 (6th Cir. 1994), cert. denied, 513 U.S. 1061 (1994), *Kent v. Johnson,* 821 F.2d 1220, 1223 (6th Cir. 1987) *and Patterson v. Mintzes,* 717 F.2d 284 (6th Cir. 1983). Any conflicts of decisions within the Sixth Circuit may clearly be resolved by the Court below and do not establish any "compelling reason" to grant this petition under Supreme Court Rule 10.

There is no material difference in the legal analysis used by the Sixth Circuit in any of these cases to determine whether to apply a waiver "in the interest of justice." *Kelley* held merely that incorporating other documents by reference might be adequate to specify the objections to the magistrate judge's report and could be considered sufficient under the "interest of justice" exception to satisfy the requirements of the rule. *Kelley* cited with approval the *Kent* case. *Id.* at 366.

The *Kent* case accepted the plaintiff's affidavit that he had not received a copy of the magistrate's report mailed on June

29, 1984 until July 10, 1984 (the 11th day). Even then the objections were mailed on July 13, only one day late. Additionally the District Court had entered judgment prematurely before the ten days ran. Moreover, the Sixth Circuit felt that the case presented questions of considerable constitutional import. The Sixth Circuit properly exercised its discretion to excuse a default *in the interest of justice* (emphasis in original, 821 F.2d 1220, at 1223 citing *Thomas v. Arn*).

The *Patterson* case was decided by the Sixth Circuit in 1983 before the holding of *Thomas v. Arn*; however, its decision is not inconsistent therewith to the objection to the Magistrate's Report filed on the twelfth day. The Sixth Circuit noted that the District Court had good cause to extend the ten (10) day period of 636(b)(1) to file objections to the Magistrate's Report. *Id.* at p. 287, citing the enlargement provisions of Rule 6(b) of the *Federal Rules of Civil Procedure.*

The ruling of the Sixth Circuit in the present case is not a departure from the accepted as usual course of judicial proceedings which would justify an exercise of this Court's supervisory power under Supreme Court Rule 10.

CONCLUSION

For the reasons set forth in this response, this Court should deny the Petition for Writ of Certiorari and affirm the judgment of the Court of Appeals and the District Court in this matter. The action of the Sixth Circuit below was consistent with the holding of this Court in *Thomas v. Arn* and does not merit further review.

Respectfully submitted,

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APPENDIX 1

United States District Court for the Eastern Division of Tennessee at Chattanooga

Case No. 1:02-CV-385

[Filed May 14, 2004]

TONYA HARRIS, an administratrix of the estate of TORRIS HARRIS, Plaintiff	)
v.	)
THE CITY OF CHATTANOOGA, *et al.*, Defendants	)

Judge Curtis L. Collier

ORDER

For the reasons stated in the accompanying memorandum, the Court REJECTS Defendants' objections to Magistrate Judge Carter's Order of April 8, 2004 (Court File Nos. 99, 103); DENIES Plaintiff's motion for reconsideration (Court File No. 93); DECLARES an attorney lien in favor of Plaintiff's former counsel, Attorney Robin Ruben Flores (Court File No. 91); GRANTS Defendants leave to deposit with the Clerk of Court the funds subject to the disputed

settlement agreement pending the final disposition of Plaintiff's appeal; and GRANTS Plaintiff's application to proceed *in forma pauperis* with the condition that upon being ordered to pay any funds out to Plaintiff, the Clerk of Court shall withhold $105 from such amount to cover the applicable filing fees.

SO ORDERED.

ENTER:

/s/ _____

CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX 2

United States District Court for the Eastern Division of Tennessee at Chattanooga

Case No. 1:02-CV-385

[Filed May 14, 2004]

TONYA HARRIS, an administratrix of the estate of TORRIS HARRIS,
Plaintiff,

v.

THE CITY OF CHATTANOOGA, *et al.*,
Defendants.

MEMORANDUM

Before the Court are a variety of pending motions which the Court will address in a single Order. Plaintiff Tonya Harris ("Plaintiff") has filed a motion for reconsideration of the Court's Order dated March 3, 2003 (Court File No. 93), former counsel for Plaintiffhas filed a motion for declaration of an attorney lien (Court File No. 91), and Defendants City of Chattanooga and Martin Penny have filed an objection to an Order entered by the Magistrate Judge William B. Carter denying Defendant Charles Kinsey's previous motion to strike Plaintiff's motion for reconsideration (Court File No. 99)

which Kinsey adopted (Court File No. 103). Additionally, Plaintiff filed a notice of appeal (Court File No. 94), and an application to proceed *in forma pauperis* on appeal (Court File No. 95). Defendants Kinsey and David Allen filed responses to Plaintiffs motion for reconsideration (Court File Nos. 101, 104) but Plaintiffhas not replied or filed responses to the other pending motions. For the reasons set forth below, the Court will **REJECT** Defendants' objections to Magistrate Judge Carter's Order of April 8, 2004; **DENY** Plaintiff's motion for reconsideration; DECLARE an attomey lien in favor of Attorney Flores; and **GRANT** Plaintiff's application to proceed *in forma pauperis* on appeal subject to certain conditions.

I. RELEVANT FACTS

Plaintiff Tonya Harris ("Plaintiff") brought this action on behalf of her deceased son, Torris Harris ("Decedent"), seeking damages pursuant to 42 U.S.C. § 1983 for Defendants' alleged violations of Decedent's rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution (Court File No. 1). Through a series of communications in December 2003, Plaintiff's former counsel, Robin Reuben Flores ("Attorney Flores"), reached an agreement with counsel for the various Defendants to settle this action and a related pending action in state court in exchange for the sum of $28,500. However, on or before January 1, 2004, Plaintiff decided to reject this settlement agreement and Attorney Flores communicated his clients' wishes to counsel for Defendants and proceeded with the prosecution of the lawsuit. Defendants then filed various motions to enforce the settlement agreement (Court File Nos. 68, 72, 75, 80, 83). Magistrate Judge Carter held a hearing on the matter and issued a Report and Recommendation ("R&R") concluding Attorney Flores had apparent authority

to settle the case on Plaintiff's behalf and recommending the Court grant the Defendants' motions (Court File No. 89). Upon receiving no objections from the parties, the Court adopted the R&R and closed the case on March 3, 2004 (Court File No. 90).

Thereafter, Attorney Flores filed a motion to withdraw as counsel for Plaintiff (Court File No. 92) and a motion to declare an attorney lien (Court File No. 91). Plaintiff then filed a *pro se* motion for reconsideration of the Court's Order enforcing the settlement agreement (Court File No. 93), a notice of appeal from that Order (Court File No. 94), and an application to proceed informa pauperis on appeal (Court File No. 95). Defendant Kinsey filed a motion to strike Plaintiff's motion for reconsideration as *ex parte* and redundant (Court File No. 96). On April 8, 2004, Magistrate Judge Carter granted Attorney Flores' motion to withdraw and denied Defendant Kinsey's motion to strike (Court File No. 98).

II. DISCUSSION

The Court will address the various pending motions in turn, though not in chronological order.

A. Defendants' Objections to Magistrate's Ruling on Motion to Strike

Defendants City of Chattanooga, Penny, and Kinsey have objected to Magistrate Judge Carter's ruling on Kinsey's motion to strike Plaintiff's *pro se* motion for reconsideration by way of their own motions to reconsider (Court File Nos. 99, 103). When nondispositive matters have been referred to and decided by a magistrate judge, a party dissatisfied with the magistrate judge's ruling may make objection thereto within ten days of being served with a copy of such ruling and

the district court "shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). Review of factual determinations are governed by the clearly erroneous standard. *Young v. Construction Corp.*, 899 F. Supp. 39, 40 (D.N.H. 1995); *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 340 (S.D. Iowa 1993). A magistrate judge's factual finding is clearly erroneous when it is contrary to the clear weight of the evidence or when it leaves the reviewing court with a definite and firm conviction a mistake has been committed. *Young,* 899 F. Supp. at 40. However, a magistrate judge's conclusions of law are reviewed under the more lenient "contrary to law" standard. *Id.; Jochims,* 151 F.R.D at 340; *Bryant v. Hilst,* 136 F.R.D. 487, 488 (D. Kan. 1991). The district court is empowered to modify or set aside any factual or legal ruling of a magistrate judge which does not survive application of the clearly erroneous or contrary to law standard of Rule 72(a). *Young,* 889 F. Supp. at 40.

On March 23, 2004, the Court received a letter from Plaintiff asking the Court to reconsider its March 3, 2004 Order adopting the R&R and enforcing the settlement agreement (Court File No. 93). The Court interpreted this letter as a motion for reconsideration and instructed the Clerk of Court to docket it as such. Kinsey filed a motion to strike Plaintiff's letter/motion on the grounds it was an improper *ex parte* communication with the Court and, in any event, was filed more than ten days after entry of the order sought to be reconsidered (Court File No. 96). Magistrate Judge Carter denied Kinsey's motion after finding Plaintiff's motion was not an *ex parte* communication because Plaintiff was unrepresented by counsel, having terminated Attorney Flores, and her letter indicated copies had been sent to all opposing counsel (Court File No. 98). Magistrate Judge Carter declined to consider the timeliness of Plaintiff's letter/motion,

indicating such matters would be dealt with by the Court in ruling directly upon the motion (*id.*).

Defendants now object to Magistrate Judge Carter's Order on the basis of its failure to reference the notice of appeal filed by Plaintiff and alleged failure of service upon the City and Penny until after Kinsey filed his motion to strike (Court File No. 99, ¶¶ 1-2). Thus, Defendants argue, Plaintiff's letter/motion is either untimely or seeks relief which the Court now has no jurisdiction to grant in light of Plaintiff's filing of a notice of appeal (*id.* ¶ 2). The Court will deal with any and all considerations regarding the timing of Plaintiff's letter/motion *infra* in conjunction with the merits of that motion. To the extent Defendants argue the Court lacks jurisdiction over Plaintiff's letter/motion, the Court notes Plaintiff's notice of appeal was filed in conjunction with her application to proceed *in forma pauperis*. Therefore, Plaintiff's notice of appeal does not become effective until either Plaintiff pays the required filing fees or the Court grants her application for pauper status. Because neither event has yet occurred, the Court retains jurisdiction over all matters. Accordingly, the Court will **REJECT** Defendants' objections to Magistrate Judge Carter's denial of Kinsey's motion to strike.

B. Plaintiff's Motion for Reconsideration

Plaintiff's motion for reconsideration asks the Court to revisit its March 3, 2004 Order adopting the R&R and enforcing the settlement agreement. Plaintiff alleges the settlement agreement was "procured with fraud and deception" by her former attorney "against [her] wishes and without [her] approval" (Court File No. 93). Because Plaintiff's motion was not filed within ten days of the entry of the Court's Order granting summary judgment in favor of

Defendant, the period during which a motion to alter or amend under Fed. R. Civ. P. 59(e) must be filed, the Court deems Plaintiff's motion to be a motion for relief from judgment under Fed. R. Cir. P. 60(b). Rule 60(b) seeks to strike a balance between the needs of justice and the policy concerns favoring finality of judgments. *Wuliger v. Cohen*, 215 F.R.D. 535,537 (N.D. Ohio 2003) (citing 12 James Wm. Moore, Moore's Federal Practice, § 60.0212], n. 6 (3d ed. 2002)). Thus, the Court may grant relief from a final judgment, order, or proceeding based upon:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. Fed. R. Civ. P. 60(b). Although motions under Rule 60(b) are addressed to the discretion of the Court, the Court's inquiry is limited to determining whether one of the specified circumstances exists such that the plaintiff is entitled to reopen the merits of his or her underlying claims. *See Feathers v. Chevron U.S.A., Inc.*, 141 F.3d 264, 268 (6th Cir. 1998). A Rule 60(b) motion is not a means by which to relitigate the case, a substitute for an appeal, or a "technique to avoid the consequences of decisions deliberately made yet later revealed to be unwise." *Hopper v. Euclid Manor*

Nursing Home, Inc., 867 F.2d 291,294 (6th Cir. 1989); *Mayhew v. Gusto Records, Inc.*, 2003 WL 21525106 at *2 (6th Cir. Jul. 2, 2003) (unpublished opinion) (citing *Mastini v. Am. Tel. & Tel. Co.*, 369 F.2d 378, 379 (2d Cir. 1966)).

Of the six circumstances justifying relief from judgment under Rule 60(b), only subsections (3) and (6) appear to be invoked by Plaintiff. However, the facts of Plaintiff's case do not warrant relief under either provision. Plaintiff generally alleges fraud and deceit on the part of attorney Flores, but Rule 60(b)(3) only provides for relief on the basis of "fraud,.., misrepresentation, or other misconduct *of an adverse party.*" Because Plaintiff's attorney was not an adverse party, Rule 60(b)(3) has no application to his alleged actions.

Rule 60(b)(6), which allows relief for "any other reason justifying relief," is properly invoked only in "unusual and extreme situations where principles of equity *mandate* relief." *Ollie v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (emphasis in original). "Courts have stressed... 60(b)(6) should be used only in exceptional or extraordinary circumstances.., and can be used only as a residual clause in cases which are not covered under the first five subsections of Rule 60(b)." *Pierce v. United Mine Workers of America Welfare and Retirement Fund,* 770 F.2d 449, 451 (6th Cir. 1985), *cert. denied,* 474 U.S. 1104, 106 S. Ct. 890, 88 L. Ed. 2d 925 (1986). Thus, district courts may employ their discretion "to achieve substantial justice when 'something more' than one of the grounds contained in Rule 60(b)'s first five clauses is present." *Hopper,* 867 F.2d at 294.

Plaintiff's circumstances, while undoubtedly frustrating and emotional, do not amount to the unusual or extreme

situation contemplated by Rule 60(b)(6). Plaintiff's contentions and representations regarding Attorney Flores' actions and her own state of mind do not call into question either the R&R or the Court's previous Order enforcing the settlement agreement. The Court entered the Order enforcing the settlement agreement upon concurring with Magistrate Judge Carter's conclusion attorney Flores had apparent authority to settle Plaintiff's case on her behalf. Whether or not attorney Flores had *actual* authority to do so has no impact on liability as between Plaintiff and the various Defendants. At this point, Plaintiff's only recourse lies in a separate action against attorney Flores. Accordingly, the Court will DENY Plaintiff's motion for reconsideration.

C. Attorney Flores' Motion to Declare Attorney Lien

In connection with his motion to withdraw as counsel for Plaintiff, attorney Flores filed a motion to declare an attorney lien in his favor "on any amounts in settlement or judgment in this case pursuant to a contract of employment between Plaintiff and [Attorney Flores] for expenses, and attorneys fees" (Court File No. 91). Tennessee law provides "[a]ttoneys and solicitors of record who begin a suit shall have a lien upon the plaintiff's or complainant's right of action from the date of the filing of the suit." Tenn. Code Ann. § 23-2-102. This lien "attaches to any proceeds flowing from a judgment, as long as the lawyer worked to secure that judgment for the client." *Starks v. Browning,* 20 S.W.3d 645, 651 (Tenn. Ct. App. 1999). Although attorney's fees arrangements are contracts governed by state law, "the federal court's interest in fully and fairly resolving the controversies before it requires courts to exercise supplemental jurisdiction over fee disputes that are related to the main action." *Kalyawongsa v. Moffett,* 105 F.3d 283, 287-88 (6th Cir. 1997). Thus, under Tennessee law, a court having jurisdiction over an action,

whether state or federal, may declare the existence of an attorney's lien. *Id.* at 288; *Schmitt v. Smith,* 118 S.W.3d 348, 351-52 (Tenn. 2003). Therefore, the Court will **DECLARE** attorney Flores shall hold a lien on the proceeds of the settlement in Plaintiff's favor, but the Court takes no action regarding the enforcement of that lien.

D. Disposition of Funds

Defendants City of Chattanooga and Penny have requested they be permitted to deposit the settlement funds with the Court pending the outcome of these proceedings and any appeal which is taken by Plaintiff(Court File No. 99, ¶ 4). There having been no objection to this request, the Court **GRANTS** Defendants leave to deposit the $28,500 provided for by the disputed settlement agreement with the Clerk of Court pursuant to Rule 67.

E. Matters Relating to Plaintiff's Appeal

The final issue to be addressed is whether Plaintiff should be allowed to appeal the Court's March 3, 2004 Order *in forma pauperis*. Plaintiff has filed an application seeking pauper status on appeal (Court File No. 95) which the Court finds demonstrates she is sufficiently indigent to warrant the waiver of fees on appeal. Accordingly, the Court will **GRANT** Plaintiff's application and **DIRECT** the Clerk of Court to transmit Plaintiff's appeal to the United States Court of Appeals for the Sixth Circuit without requiring Plaintiff to first pay the applicable fees. However, the Court notes Plaintiff has access to a potentially significant asset in the form of the funds from the disputed settlement agreement. Therefore, if and when the Clerk of Court is ordered to distribute the funds from the settlement agreement to Plaintiff, the Clerk of Court shall withhold the $105 in filing fees

required by 28 U.S.C. §§ 1913 and 1917. In the event Plaintiff prevails on appeal and is able to obtain a reversal of the Court's Order enforcing the settlement agreement, she will not be required to pay those fees.

An Order shall enter.

/s/ _____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE